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JUN 30 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

June 30, 1998

Secretary William F. Caton
Federal Communications Commission
1919 M Street, NW
Room 234
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Dear Secretary Caton:

Enclosed please find an original and nine copies of the comments of Self Help for Hard of Hearing People, Inc. (SHHH) on the Notice of Proposed Rulemaking on Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities. I am also enclosing a disk of the comments to enable others the ability to read these comments in other formats.

Thank you for the opportunity to submit comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Donna L. Sorkin".

Donna L. Sorkin
Executive Director

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

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JUN 30 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 255 of the)
Telecommunications Act of 1996)
)
Access to Telecommunications Services,)
Telecommunications Equipment, and)
Customer Premises Equipment)
By Persons with Disabilities)

WT Docket No. 96-198

**COMMENTS OF
SELF HELP FOR HARD OF HEARING PEOPLE, INC. (SHHH)**

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June 30, 1998

TABLE OF CONTENTS

	<u>Page</u>
1. Introduction.....	1
2. FCC Authority.....	2
3. Access Board Guidelines.....	3
4. Telecommunications vs. Enhanced Services.....	5
5. Telecommunications Equipment.....	8
6. Manufacturers.....	9
7. Definition of Disability.....	9
8. Accessibility and Compatibility Requirements.....	10
Usability.....	10
Accessibility.....	11
9. Compatibility.....	11
10. Readily Achievable.....	12
Market Considerations.....	15
Cost Recovery.....	17
Timing.....	19
11. Enforcement Authority.....	20
Sections 207-208.....	20
Sections 312 and 501-504.....	22
12. Complaint Process.....	23
Filing Fees.....	23
Standing Requirement.....	23
No Time Limit.....	24
Complaints Against Manufacturers.....	24
Regulations Governing Complaints.....	25
Need for Respondents to Produce Relevant Documents and Information	25
Five-Month Limit.....	26
Formal Complaints.....	28
Fast Track Problem-Solving Phase.....	29

	<u>Page</u>
13. Defenses to Complaints.....	31
Product vs Product Line.....	31
14. Penalties for Non-Compliance.....	32
15. Conclusion.....	33
Attachment (The Washington Post, June 25, 1998)	

1. Introduction

Self Help for Hard of Hearing People, Inc. (SHHH) hereby submits comments in response to the Federal Communications Commission's Notice of Proposed Rulemaking on Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities.

SHHH is a national educational organization representing people who are hard of hearing. Its members are people of all ages and degrees of hearing loss. Through a National office, seven state associations and a network of 250 chapters and groups across the country, SHHH members consistently work towards increasing communication access to enable people who are hard of hearing to continue to function in mainstream society. Access to telecommunications is integral to being able to actively participate in today's world.

The Commission's NPRM on Section 255 was long awaited. Since Section 255 became effective on February 8, 1996, the Commission's staff has spent considerable time discussing accessibility issues with consumer groups, equipment manufacturers, and service providers. It built a record through the Notice of Inquiry and has had ongoing consultations with the Access Board staff, who issued accessibility guidelines for equipment in February, 1998. It was, therefore, with disappointment and dismay that we read the proposed rule when it was finally released April 20, 1998. The major concern is with the lack of proposed regulatory language and clear-cut rules. The

document asks over seventy questions and in many important areas reads more like a notice of inquiry than a NPRM.

Additionally, though the Commission acknowledges Section 255 as the most significant governmental action for people with disabilities since the passage of the Americans with Disabilities Act, and that Section 255 was about ensuring that all Americans can gain the benefits of advances in telecommunications services and equipment. It then proceeds to define readily achievable, a key standard for implementing the law, in such a way as to negate the entire law and call into question the notion of disability access as we have come to define it in the United States.

2. FCC Authority

SHHH supports the Commission's tentative ruling that it has more than ample authority to promulgate rules on how to comply with the equipment and service accessibility mandates of Section 255. Specifically, Section 4(i) of the Communications Act explicitly permits the Commission to "perform any and all acts, makes such rules and regulations, and issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions" as indicated in paragraph 26 of the NPRM. The statutory language of Section 255 itself, which directs the Access Board to develop guidelines "in conjunction with the Commission" and to periodically review and update the guidelines, also makes clear that authority.

Not only does the Commission have authority, it should issue regulations as this is essential to achieving the type of telecommunications access for individuals with disabilities that was contemplated by Congress. If we are to change industry's mindset in the way products and services are designed, taking into consideration multiple users with diverse needs, then the Commission must provide telecommunications providers and manufacturers with clear guidelines so that they understand the extent and nature of their accessibility obligations from the outset.

SHHH and other consumer organizations are well aware that industry does not want to be regulated and view regulations as impinging on their culture and way of operating. However, historically market forces have never worked for people with disabilities and this is the one area where if progress in accessible products and services is to be made, regulations in some form are essential.

3. Access Board Guidelines

It is not clear from the NPRM whether or not the Commission proposes to adopt the Access Board guidelines. In fact, it appears the Commission is leaning towards not adopting the guidelines for services and instead developing its own regulations. The Commission states that it views the Board's guidelines as "our starting point for the implementation of Section 255." We wonder what "starting point" means. The NPRM also mentions that the guidelines will be "given substantial weight" and that they will be taken into consideration as good faith actions when complaints are being investigated. The Commission is concerned that the Access Board guidelines, written

for equipment manufacturers, may not be applicable to services, and therefore it is leaning towards adapting them for a better fit. We disagree and strongly urge the Commission to adopt the Access Board guidelines in full for both manufacturers and service providers. We believe their adoption was the intent of Congress when it authorized the Access Board, as the primary agency, to develop guidelines for equipment manufacturers, and the Commission to enforce such guidelines. The Access Board has unique expertise in developing accessibility guidelines for this statute given its past experience with the Americans with Disabilities Act and the Architectural Barriers Act. We believe this is why Congress entrusted such responsibility to the Board and gave enforcement power to the Commission. We also believe that requiring the adoption of the guidelines for services would facilitate a coordinated approach to accessibility for both services and equipment. All interests—industry, consumers, and the Commission—will be best served by a rule that clearly states the requirements of both equipment and services. The Access Board guidelines provide such clarity. If the Commission adopts only part of the Access Board guidelines and proceeds to add its own language, there will be considerable confusion as to industry responsibilities.

Additionally, Congress gave responsibility for updating the guidelines to the Access Board. The Access Board cannot undertake such periodic updates effectively unless it is recognized by the Commission as the body with such responsibility. As is currently the case with the ADA Guidelines development and the Department of Justice, the Federal Communications Commission would need to be intensively involved in revision activities.

Access to telecommunications is in its infancy and little is available to guide engineers of products and systems in developing solutions to access problems. Likewise, concrete measures to indicate when access in telecommunications has been achieved are virtually nonexistent. Creative solutions will evolve as engineers routinely design with access in mind and a body of knowledge and expertise is built up. Meanwhile, the Access Board guidelines provide concrete goals and some examples of how to reach such goals without putting constraints on how companies achieve accessibility. The guidelines are flexible so as to not stifle innovation, a major concern of industry. The proposal presented by the Commission in the NPRM is unclear and does not provide adequate guidance. The Commission should adopt the Access Board guidelines in full and make them a clear mandate for everyone in the final rule.

4. Telecommunications vs. Enhanced Services

Enhanced services like automated voice response systems have become commonplace in the past five years. Congress could not have intended to eliminate important and widely used services from the scope of Section 255, as doing so would undermine the very purpose of the law. As the Commission so rightly states in the “NPRM Introduction-Summary”, the inability to use telecommunications equipment and services can be life-threatening in emergency situations, can severely limit educational and employment opportunities, and can otherwise interfere with full participation in business, family, social and other activities.

The Commission's historical distinction between "enhanced" services and "adjunct-to-basic" services has nothing to do with the issue of access to the world of telecommunications by people with hearing loss. Rather, that historical distinction has been made in traditional Title II regulatory concepts such as tariffing, resale, networking, oversight of customer premises equipment (CPE), distinctions among voice, basic non-voice (BNV) and enhanced nonvoice (ENV), cross-subsidization issues, and the like. See Computer 11, Non-Accounting Safeguards Order and NATA Centrex Order decisions relied on in the NPRM in applying the historical distinction between "enhanced" and "adjunct-to-basic" services to this proceeding.

Many of the services currently classified as "enhanced services" do indeed "bring maximum benefit to the public through their incorporation in the network."

Eliminating these services from coverage under Section 255 creates barriers to completing a call for people with disabilities. Many people with hearing loss do not now have access to enhanced services. Many of our hard of hearing members have told us they hang up when faced with voice mail and automated voice response systems. Because these systems are so commonplace, there are many important calls that hard of hearing people are unable to complete. Such systems cannot be accessed by TTY relay services since there is generally insufficient time for the relay operator to type the choices and receive a response from the individual using a TTY. Hearing aid users have great difficulty understanding the message or discriminating between numbers such as 2 and 3. The automated voice response systems go too fast, are not clear and do not allow for repeats, making them inaccessible for most people with hearing loss.

Further, if such menu systems require quick responses, they may not be usable by people with other disabilities. These menus should be set up to allow someone to escape early on by dialing a standard number such as “0” to talk to a person. This would appear to be an easy solution but some form of regulation is needed for this to happen.

Given the broad objectives Congress sought to accomplish by its enactment of Section 255, we believe Congress intended it to apply to a broad range of services such as voice mail, automated voice response and electronic mail. Without appropriate regulations governing “enhanced services”, access goes one step forward and two steps backward as more barriers are created. As services merge, the distinctions between enhanced, basic and adjunct to basic are superficial at best. Communication via technology, in whatever form, whether phone calls over the internet or email received on a phone handset, must be governed by Section 255 if access is to be achieved in the manner it was intended.

Section 254 of the Telecommunications Act contains the Congressional mandate for universal service to ensure that all Americans have access to both basic and advanced telecommunications services. We believe enhanced services also falls within the scope of Section 255.

5. Telecommunications Equipment

We agree with the proposal that Section 255 apply to multi-purpose equipment when it serves a telecommunications function. When a manufacturer produces equipment that was intended for a non-telecommunications application but has use in connection to a telecommunications service, the obligation should be to the application, not the intent. As long as the equipment has a telecommunications use, it is covered by Section 255.

We support the interpretation that the focus of Section 255 should be on functionality and that software is simply one method of controlling telecommunications functions. Therefore software should be subject to accessibility requirements to the extent that it provides telecommunications functions. Customer premises equipment (CPE) is increasingly dependent on software, and convergence is blurring historical lines between network functions and telecommunications appliances. However, we do not agree that software to be used with CPE that is marketed separately from the CPE should be excluded from coverage under Section 255. As long as its application is one that relates to telecommunications, then it should be covered. Software is a component of the CPE that is required in order to use the device for a telecommunications function. To complete a call, software is needed. The accessibility of the CPE depends on the software. Therefore it is not logical to exclude software which is not initially bundled with the CPE because it can and will be used with the CPE later. Such an approach appears to be anticompetitive. If adopted, the Commission would be promoting a policy that encourages consumers with disabilities to use bundled software.

6. Manufacturers

We support the view that all equipment marketed in the United States, regardless of national origin, should have uniform accessibility requirements. The Access Board guidelines do not distinguish between foreign and domestic manufacturers. Given the large percentage of telecommunications equipment that is produced outside of the U.S, Section 255 would be severely limited if it were not applied universally to foreign as well as to domestic markets. Laws governing access for people with disabilities have not distinguished between domestic and foreign manufacturers. For example, televisions and telephone equipment are covered regardless of where they were manufactured. Section 255 should be applied to all manufacturers offering equipment for sale in the United States, regardless of their location or national affiliation.

We support the Commission's definition of "manufacturer" based on the Access Board guidelines as fixing responsibility for product accessibility on the "final assembler." Equipment commonly consists of components manufactured by several different companies. Assuming assemblers have control over the components they use, they could specify accessible components from their suppliers and negotiate the cost of compliance. This approach would reduce the complexity of overseeing compliance.

7. Definition of Disability

The Commission proposes to adopt the ADA's definition of disability and the Access Board's list of categories of common disabilities. We support this proposal.

8. Accessibility and Compatibility Requirements

Usability. The Commission proposes to use the term “accessibility” in the broad sense to refer to the ability of consumers to actually use the equipment or service by virtue of its inherent capabilities and functions. SHHH disagrees with this approach. It is important to preserve the nuances of the two words, usability and accessibility, and maintain the way the Access Board handles the two definitions. *Usability* and *accessibility* are two different concepts. Use is independent of access and there is the potential to overlook usability when the two are merged together.

The Commission rules should cover not only the engineering of the product or service, but also the company’s business practices as well. The ability to access customer service, pay a bill, and receive general product information in accessible formats is integral to using the products or services and hence must be covered.

Although the Commission proposes to adopt the Access Board’s definition of usability (which requires access to the documentation for the product, including instructions, product information including accessible feature information, and technical support), it is not clear whether the Commission intends to actually impose these as requirements. Because there is no regulatory language proposed on this issue, one cannot determine if the Commission intends that these items are required, or rather options for the service provider that will be “looked favorably upon” after a complaint has been filed.

Accessibility. The Commission proposes to adopt the Access Board's definition of accessibility and related appendix materials, including the requirements for access to input, control, and mechanical functions, and to output, display, and control functions. The Commission proposes to use the definition as a basis for evaluating accessibility obligations for equipment, consumer support services and telecommunications services. We support using the Access Board's guidelines to evaluate telecommunications service accessibility as well as products. However, there is no proposed regulatory language making it clear that such access is required of all telecommunications manufacturers and service providers, not merely that the Commission will look at these factors only if a complaint against a company is filed. Language to this effect needs to be clearly stated as a rule.

9. Compatibility

The Commission proposes that devices and CPE should be considered "commonly used" by people with disabilities when they are affordable and widely available. We vehemently oppose this definition. Many specialized devices are not very affordable (e.g., telebriilles that cost several thousand dollars). Therefore, these devices, are not very widespread. However, they are critical for deaf/blind people to have access to telecommunications. Each disability group could easily identify which devices are functionally effective and are most commonly used by individuals with a particular disability. SHHH encourages the Commission to enlist the help of the various disability organizations to compile and maintain a list of commonly used devices. SHHH would

be pleased to assist in developing a list of devices commonly used by hard of hearing people for access to telecommunications.

The Commission also proposes that there be a rebuttable presumption that a device is commonly used when it is distributed in a state equipment distribution program. We support this proposal.

The Commission proposes to adopt the Access board's list of five criteria for determining compatibility. We support adoption of these criteria.

10. Readily Achievable

The Commission has markedly altered the definition of readily achievable (i.e., easily accomplishable and able to be carried out without much difficulty or expense) compared to how it has previously been interpreted in disability law.

Although the Commission states that readily achievable as defined by the ADA is “applicable to telecommunications equipment and services”, it goes on to propose a smorgasbord of options that can be considered in the determination of readily achievable which includes feasibility, expense, practicality (resources, cost recovery, market considerations) and other considerations. Some of the proposed factors are appropriate in a telecommunications environment but others seriously undermine Section 255 and would guarantee that few, if any, accessible products, come to market.

The term readily achievable was adopted from the ADA as an enforcement standard for Section 255. However, although the term is borrowed, the determining factors proposed by the Commission are markedly different from those that have traditionally been applied under the ADA. In response to the Commission's Notice of Inquiry questions were raised by commenters as to how applicable the concept readily achievable, as used in the built environment, is to the telecommunications arena. Several commenters noted that the definition should be adapted when applied to telecommunications. This reasoning results from viewing access as an expense and a negative feature rather than as an opportunity. There are sound business reasons for accessible design. There may in fact be value added to a product from built-in accessibility features. For example, accommodations made in the built environment such as elevator bells and lights, voice announcements, and curb cuts are found to have a high percentage of users without disabilities. There is no reason to believe that this will not be replicated in telecommunications. One obvious example is the volume control feature on telephones which everyone finds useful in noisy situations or when the other party has a very low voice. Accommodations in telecommunications provide alternative modes of operation which could be attractive to a variety of users who are not necessarily disabled.

Historically, the definition of readily achievable in the disability arena – government and agency interpretation – has been based on the resources of the facility. Though readily achievable is a lower standard than undue burden, the Department of Justice uses the same factors in determining both. The Commission proposes that the same

factors used under the ADA--- resources including financial, staff, facilities, and other-- available to the provider to meet the expenses associated with accessibility may be taken into consideration. Following the ADA, the Commission proposes to establish a presumption that the resources reasonably available to achieve access are those of the entity legally responsible for the equipment or service which is subject to Section 255. The resources of a parent company may be considered "only to the extent those resources are available to the subsidiary." We believe this is a fair and reasonable determination.

Technical feasibility (lack of available technology or physical impossibility) is also a reasonable factor in a readily achievable determination specific to telecommunications. However, this should be an evolving concept. As new technology is developed, designing a particular access solution that is not possible today may become possible in the future and therefore could no longer be used as a rationale for not providing access. Industry should have an obligation to continually assess the accessibility of its products. We support the Commission's statement in footnote 200. "Although existing accessibility solutions are, by definition, feasible, we do not propose to determine that a solutions is unfeasible simply because the solution has not yet been found".

The Commission also states that there might be legal impediments to implementing some features. In the event of proprietary and standards issues creating barriers to designing access, the Commission should create a process to reduce regulatory

impediments within the Commission and require anyone asserting this defense to demonstrate their efforts to overcome legal impediments.

The two factors that significantly and dramatically undermine the Congressional intent of the statute are **market considerations** and **cost recovery**.

Market Considerations. These are defined as including the potential market for the more accessible product, and the extent to which the more accessible product could compete with other offerings in terms of price and features.

It is difficult to understand why market considerations were included in the list of readily achievable determinations. The underlying premise for including Section 255 in the Telecommunications Act of 1996 was precisely because market forces rarely work for people with disabilities. Every improvement of significance in making telecommunications accessible has come about as a result of legislative requirements – not market forces.

Telecoils and volume control in voice telephones, decoding capability in TVs, and telecommunication relay services are just a few examples of legislation that has enabled people with hearing loss to use telecommunications and without which such changes would not have occurred. All came about as a consequence of federal mandates.

Indeed, FCC Commissioner Harold Furchtgott-Roth, despite his general support of deregulation, conceded that, “This particular area of regulation may well be a rare

instance of where the involvement of the federal government introduces efficiencies unlikely to develop in the market.” If, under the readily achievable test, manufacturers are exempt from making accessible products in instances in which there is a perceived or relatively small market, then we will never achieve the changes in access that Congress intended for people with disabilities under Section 255.

One relevant example is the introduction of talking caller ID. This provides access to caller ID for blind people. If market factors had been taken into consideration, talking caller ID would never have been developed. If industry is permitted to compare the market potential of an accessible product with that of other mainstream products, (which are often inaccessible), then the Commission is in effect sanctioning the sale of inaccessible products. **Such market comparisons have no place in the determination of readily achievable and are in direct conflict with the underlying premises for the law.**

The Access Board guidelines provide that “no change shall be undertaken which decreases or has the effect of decreasing the net accessibility, usability, or compatibility of telecommunications equipment or CPE”. The Commission is concerned that this principle should not operate in such a way as to prevent legitimate feature trade-offs as products evolve, nor should it stand in the way of technological advances. Clearly it is not in anyone’s best interest to interfere with technological development. However, it is critical that a particular access function is retained, even if it is achieved differently. No matter how a product or service is changed, the basic access function should be

retained in whatever mode makes access possible. There are many such examples of disability access going backwards, resulting in people being relegated to second class status. Blind people lost access to computers when graphic user interface was first introduced. Hard of hearing people lost access to phones when digital wireless handsets were introduced. As a society, we must ensure that as technology advances, the needs of people with disabilities are addressed appropriately. Such access has been long in coming in America and we cannot afford to go backwards. We encourage innovation and development and want to be sure that designers plan for access, either through existing access functions or via other innovative solutions

Cost Recovery. This is defined by the Commission as the extent to which an equipment manufacturer or service provider is likely to recover the costs of increased accessibility. Introducing cost recovery as a factor in assessing readily achievable is wholly inappropriate and will likely result in few accessible products being developed for all of the reasons detailed above. Section 255 was adopted by Congress precisely because the market has traditionally not worked for people with disabilities. In America we recognize that there is a greater good in ensuring that people with disabilities have access to work, medical care, travel, and everyday living. Telecommunications are central to one's ability to function as a productive citizen in America and consequently we have determined that there is a greater good to society in ensuring that such access is mandated and provided, if it is feasible to do so.

Protection from incurring an excessive cost burden is already provided by the readily achievable language, which is interpreted to mean: “easily accomplished and able to be carried out without much difficulty or expense”. Indeed, this “cheap and easy” interpretation, which has traditionally been used under the ADA is now suggested for Section 255, is already a low standard. Readily achievable is considerably less burdensome than the “undue burden” standard implying “significant difficulty or expense” that is applied to public entities under the ADA.

There may well be some costs in providing such access that are not covered by increased sales to people with disabilities. These costs can be spread out over the thousands or millions of users to ensure that people with disabilities can fully participate in today’s society. Such is the case with the Telecommunications Relay Services (TRS) for which all of us pay a small amount (i.e., 10 cents) each month on our monthly phone bill to support such services for people who are hard of hearing, deaf, or speech impaired.

In summary, although certain economic and cost factors are appropriate in the determination of readily achievable (i.e., overall resources of the entity, nature and cost of the action), cost recovery and market considerations have no place in the consideration of disability access. These are concepts that would not only undermine the intent of Section 255 but could also negatively impact the general approach to disability access as it has evolved in the United States in the past 10

years.

Timing. If a product is introduced without accessibility features because such access features were not possible at the time, the Commission states that Section 255 does not require that the product be modified to incorporate subsequent, readily achievable access features. We do not believe this was the intent of the law. Congress could not have intended that access be put off forever. Timing should not be a defense in itself. Section 255 applies to the design and “development” of a product. Access should be incorporated in the early stages of design. When such features are not possible, there is an ongoing obligation for the company to stay abreast of technological advances and incorporate the appropriate access solution when it is technically feasible to do so. Readily achievable should be a determination throughout the design and development stage, no matter how long or short that is. The Access Board guidelines require incorporation of access when there are significant upgrades of products. This requirement should be incorporated into the Commission’s rules for both products and services.

Given the wide range of telecommunications products emerging constantly, the unique nature of disabilities, and the status of access solutions SHHH agrees that readily achievable determinations should be made on a case by case basis.

11. Enforcement Authority

SHHH supports the Commission's view that in vesting the agency with exclusive jurisdiction to undertake enforcement of Section 255, Congress intended that the agency's full complement of enforcement powers would be available. These include Sections 207-208, 312 and 501-504 of the Communications Act.

Sections 207-208. The Conference Report makes explicit reference to the use of Sections 207-208 in the enforcement of Section 255:

The remedies available under the Communications Act, including the provisions of Sections 207 and 208, are available to enforce compliance with the provisions of Section 255.

Conf. Rep. 104-230, 104th Cong., 2d Sess. (1996) at 135.

The importance of this reference cannot be overstated. These sections have been on the law books since the Commission was founded in 1934 and, indeed, were taken from the Interstate Commerce Act adopted in the 1800's as amended in 1909, 24 Stat. at 382. Paglin, A Legislative History of the Communications Act of 1934, Oxford University Press (1989) at 37. They are a basic means by which citizens have protection from federally regulated industries, and Circuit Court review of agency disposition of their complaints is a basic means by which citizens have protection from action contrary to law by federal regulators.

This venerable statutory and regulatory scheme is versatile and adaptable to needs ranging from major litigation between industry parties to the resolution of complaints filed by individuals citizens, e.g., a complaint about violation of a provision of the Act

against divulging the contents of a person's private telephone conversation in Long Beach, California, Elehue and Lucilee Freemon v. AT&T, 75 RR2d 1165 (1994); refusal to accept an order for service from a teenager in Pittsburg, Kansas, Richard Johnson v. Southwestern Bell Telephone Co., 16 RR2d 941 (1969); and an overcharge to an individual in Los Angeles for a single long distance call, Charles Spencer Williams v. Pacific Telephone and Telegraph Co., 28 RR2d 1022 (1973).

Sections 207-208 are available for dealing with properly structured class actions on behalf of similarly-situated parties, e.g., Phillips v. Grand Trunk Ry., 236 U.S. 662, 665 (1915) (under the Interstate Commerce Act, holding that a proceeding to determine the reasonableness of a railroad rate "was not in the nature of private litigation between a Lumber Association and the carriers, but was a matter of public concern in which the whole body of shippers was interested."); Certified Collateral Corp. v. Allnet Communications Services, Inc., 63 RR2d 1185 (1987); and Associated Students of the University of Arizona v. AT&T, 28 RR2d 805 (1973) (examples of class action complaints brought under Section 208, albeit unsuccessfully on the facts of the cases).

The relief sought under Sections 207-208 may be monetary damages, which can amount to a small sum of money for an isolated individual case or more substantial sums in industry-complaint cases. The relief may also be to enjoin a party from engaging in unlawful conduct, e.g., United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (FCC has power to grant injunctive relief under its plenary agency powers in the Communications Act); Mocatta Metals Corp. v. ITT World Communications, Inc., 28